Original

ORIGINAL
FILE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-259
	)	
	)	
Broadcast Signal Carriage Issues	)	

COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

Daniel L. Brenner
Diane B. Burstein
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202)775-3664

Counsel for National Cable
Television Association, Inc.

TABLE OF CONTENTS

SUMMARY

In accordance with the terms of the 1992 Cable Act, the Commission has instituted the instant proceeding to implement the must carry and retransmission consent provisions of the new law. NCTA firmly believes that these provisions will be struck down by the courts. Assuming, arguendo, that it is not inappropriate for the Commission to move forward with its consideration of implementing regulation, we believe that any such implementing regulations should reflect the severe constitutional concerns raised by the legislative requirements at issue.

Specifically, NCTA urges the Commission to seek to maximize the extent to which cable operators remain free to exercise editorial discretion in the face of the must carry and retransmission consent requirements. For example, in implementing the non-commercial must carry rules, the FCC should permit cable operators to designate the location of the "principal headend" for purpose of applying the non-commercial must carry requirement and should determine the scope of an operator's carriage obligations on the basis of the number of channels over which programming is actually being provided. Also, the Commission should maximize operators' flexibility in using PEG channels for NCE carriage and should minimize the risk that operators will be forced to carry duplicative NCE channels.

With respect to the commercial must carry requirement, the same guiding principle should hold sway. Thus, for example, the burdens placed on operators by the must carry requirement (e.g.,

notice requirement, determining whether a signal meets the requisite quality standard) should be minimized. At the same time, the Commission should maximize the operator's control over its channels by interpreting the "local" market definition so as to avoid inconsistent and overlapping carriage requirement. In this regard, it also is critical that the Commission coordinate its must carry and non-duplication requirements to prevent systems from having to devote valuable channel space to signals filled with blackout "holes." Other aspects of the commercial must carry requirements that should be clarified to avoid unnecessary burdens on cable operators include the "leapfrogging" requirement and the channel positioning requirement.

Finally, with respect to the Act's retransmission consent provision, the Commission should endeavor to adopt implementing rules that minimize the potential that this provision holds for causing extreme disruptions in subscriber service. For example, retransmission consent should not be applied to broadcast radio retransmission; should be applied on an ADI-wide basis; and should be timed to avoid unnecessary copyright expenses. In addition, the Commission should make clear that while local retransmission consent signals count towards the fulfillment of a system's must carry obligations, the terms of carriage of retransmission consent signals -- including the extent to which non-duplication rights may be asserted -- is otherwise to be determined by negotiation among the parties. Finally, the Commission should resolve the fundamental issue of the relationship between the newly created retransmission consent

right and program exhibition contracts by determining that such contracts may not restrict a broadcaster's right to grant retransmission consent.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-259
	)	
	)	
Broadcast Signal Carriage Issues	)	

COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

The National Cable Television Association, Inc. ("NCTA"), by its attorneys, hereby submits its comments in the above-captioned proceeding. NCTA is the principal trade association of the cable television industry. Its members include owners and operators of cable television systems and cable program suppliers. Its members also include equipment suppliers and others interested in or affiliated with the cable television industry.

INTRODUCTION

As the Commission is aware, NCTA and others in the cable industry have challenged the constitutionality of the must carry and retransmission consent rules in a consolidated proceeding pending before a three-judge district court in the District of Columbia.[1/] We remain convinced that the Court will determine

---

1/ National Cable Television Association v. U.S., No. 92-2495 (D.D.C., filed Nov. 5, 1992). NCTA has also asserted that if the must carry rules are struck down, then the

(Footnote continues on next page)

that these new must carry rules, just like the two previous versions, violate cable operators' and programmers' First Amendment rights. Indeed, the Justice Department, acting on behalf of the FCC, agrees, and has refused to defend the constitutionality of the must carry provisions.

We will not here reargue the fundamental constitutional flaws with these must carry requirements and the related retransmission consent provision.[2/] However, assuming, arguendo, the appropriateness of moving forward with this proceeding to adopt rules implementing these provisions, the Commission should keep in mind the fundamental constitutional concerns raised. In interpreting the statute the Commission should err on the side of preserving, to the maximum extent possible, cable operators' exercise of their editorial discretion as to what programming to carry on their systems.

The Commission also should interpret the statute in a manner that causes the least disruption to cable subscribers' established viewing patterns. The Act sets up a scheme that has the potential to alter dramatically cable subscribers' ability to receive desired broadcast signals. Congress has fundamentally changed the definition of a "local" signal from the standard that

---

(Footnote continued)
retransmission consent provision must also fall due to its inseverability from must carry.

2/ Moreover, NCTA expressly reserves the right to challenge the rules adopted by the Commission, should that be necessary.

has guided signal carriage for decades, and television stations located hundreds of miles from a cable system may now be able to assert claims for local carriage while stations long considered local stations may now be deemed distant.[3/] And under retransmission consent, Congress has given broadcasters for the first time the right to withhold their signal from cable viewers.

The potential for disruption and subscriber confusion under these new rules is great. In fashioning its rules to implement the new law, the Commission ought to take care that the interests of cable subscribers are not forgotten in the process of seeking to balance interests.

With these general principles in mind, we submit our comments on the Commission's Notice of Proposed Rulemaking.

DISCUSSION

I. NON-COMMERCIAL MUST CARRY

A. Definition of Qualified Local NCE Station

The Notice raises several questions regarding the definition of a "qualified" non-commercial educational ("NCE") station. Among other things, Congress defined a "qualified" NCE station as an NCE station licensed to a principal community whose reference point is within 50 miles of a cable system's "principal headend", or whose Grade B contour encompasses the "principal headend" of

---

3/ For signals long considered local that may now be given distant signal status, future carriage may become especially difficult depending on how the Commission resolves issues concerning retransmission consent.

the system.[4/] The Commission proposes to allow a cable operator with multiple headends to designate its "principal" headend for must carry purposes. (NPRM at para. 8).[5/]

We agree. Allowing an operator to make this choice is consistent with the FCC's "interim" must carry rules,[6/] and makes sense as a practical matter. The adoption of detailed rules to govern the principal headend designation would serve no purpose. And arbitrary rules could impede system operations unrelated to the must carry rules. Indeed it is possible that the choice of which headend is a "principal" headend may change over time. Operators may consolidate headends or alter their system structure for a variety of legitimate business reasons. To avoid unnecessary interference with these judgments, the

---

2/ Section 615(1)(2).

5/ The Notice also seeks comments on the amount of non-commercial educational programming that a municipally owned station must provide in order to be entitled to must carry status. NPRM at para. 8. The legislative history evidences that this particular requirement was designed to protect a single station -- WNYC in New York. While we express no opinion on whether presenting educational programming during 50 percent of a broadcast week is the proper threshold, we note that the Commission should not select a criterion that unnecessarily broadens the scope of this provision to encompass other municipally owned stations.

As far as whether stations or translators operating on channels other than those reserved for educational purposes should be accorded must carry status, the Commission should examine on a case-by-case basis whether the public interest would be served by mandating carriage, balancing the impact of carriage on cable subscribers against the impact on the station.

6/ Must Carry Rules, 61 R.R.2d 792, 835 (1986).

Commission should presume that an operator should be free to modify its choice of a principal headend.[7/]

B. Signal Carriage Obligations

1. Definition of "Usable Activated Channels"

Congress adopted different caps on carriage of both non-commercial and commercial television stations depending on a system's total number of "usable activated channels".[8/] The Act defines "activated channels" to mean "those channels engineered at the headend of a cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for public, educational or governmental use."[9/] "Usable" activated channels are activated channels "except those channels whose use for the

---

7/ As the Commission earlier stated, "while we expect cable operators will exercise this discretion in good faith, we will investigate and consider appropriate actions on a case-by-case basis where operators appear to be abusing this discretion by designation their principal headend so as to avoid signal carriage obligations." Must Carry Rules (Reconsideration), 62 R.R. 2d 1251, 1289 (1987). The Commission should adopt a similar approach here.

The Commission also inquires into whether procedures should be established so it could be informed of an operator's choice of headend. We do not believe that any additional paperwork would be warranted. If a dispute arises as to this choice, the Commission undoubtedly will obtain this information in the course of resolving a station's must carry complaint.

8/ 47 U.S.C. Sections 614(b) and 615(b).

9/ Id. at 602 (1).

distribution of broadcast signals would conflict with technical and safety regulations as determined by the Commission."[10/]

The Notice proposes to include this definition in the Commission's rules.[11/] To avoid any possible controversy over whether an operator has met its signal carriage cap, the Commission should make clear that in determining the number of activated channels, a channel is "engineered at the headend" only if equipment installed in the headend is generating a video carrier on a regular basis.[12/] Merely because an operator has designed a system with bandwidth greater than the number of video carriers generated should not increase an operator's signal carriage obligations.[13/] To find otherwise would disincent

---

10/ Id. at 602(18).

11/ NPRM at 5-6 n.9.

12/ See letter from Alex D. Felker, Chief, Mass Media Bureau to Brenda L. Fox (Oct. 8, 1987) ("[w]hen determining the number of usable activated channels on a cable system one would look not towards the theoretical number of channels available but rather to the number of channels capable of providing services generally available to subscribers. [Where a system is theoretically capable of carrying 36 channels but only has the necessary equipment to carry 28 channels], the system never having the equipment (i.e. processor, etc.) to provide more than 28 channels could not be said to have more than that number even though certain parts of the system have greater capacity (i.e. the trunk lines).")

13/ There may also be situations where an operator uses a microwave link to deliver only a portion of the system's channels to a separate community. In such circumstances, the Commission should also make clear that a portion of a single system may have a lesser number of activated channels despite the fact that another community on the same system may have a greater number of channels available. For

(Footnote continues on next page)

operators to construct excess bandwidth and could result in significant new costs to operators.

2. "Substantial Duplication"

Congress made clear that cable systems should not be required to devote their limited channel capacity to carriage of duplicating broadcast signals.[14/] We agree with the Commission's proposal to define "substantial duplication" for purposes of both the medium and large system exemption to be mean that "more than 50 percent of [a station's] weekly prime time programming consists of programming aired on the other station."[15/] Since non-commercial stations often air "duplicative" programming on a basis other than simultaneously or even same day, we also endorse the Commission's proposal to establish a reasonable cut off based on weekly prime time programming.

(Footnote continued)
example, where a community unit is provided 12 channels by microwave from another community unit with 28 channels, the microwave-fed community would have 12 activated channels. See id. Thus, in determining the number of activated channels, the count should take place at the microwave receive site.

14/ Section 615(e) allows operators not to carry a non-commercial educational station if its programming "substantially duplicates" another qualified NCE station where an operator has more than 36 channels. The Act also allows an operator with a 13 to 36 channel system not to carry the signal of any additional qualified local NCE station affiliated with a state public television network if the programming of the additional affiliated station "substantially duplicates" the programming of the local NCE station being carried. Section 615(b)(3)(c).

15/ NPRM at para. 12.

3. Use of PEG Channels

The Act provides that an operator may place additional required NCE stations on unused public, educational or governmental access channels. Section 615(d). Given the constraints on cable channel capacity that must carry and access channels present, operators must have flexibility to use available channel capacity and to minimize the number of cable program services that might have to be deleted in order to make room for new must carry stations. Accordingly, we would suggest that the Commission allow operators and franchising authorities flexibility to structure use of PEG channels in a manner that makes the most sense at the local level.

4. Identification of NCE Channels Carried

In paragraph 14 of the NPRM, the Commission seeks comment on the proper means for satisfying the Act's requirement that operators upon request must identify the NCE stations carried in fulfillment of the must carry requirements.[16/] We would not object to a requirement that on request this information be provided in writing, so long as an operator is afforded a reasonable period of time in which to gather and to provide this information.

16/ The same requirement appears in the commercial must carry section of the Act.

II. CARRIAGE OF COMMERCIAL STATIONS

A. Signal Carriage Obligations

In paragraph 16, the Commission seeks comment on implementation of Section 614(b)(7), which requires operators to notify certain subscribers of those broadcast stations carried on the system that cannot be received without a converter box. We would propose that operators be required to provide this notice at the time of installation in combination with the required offer to sell or lease converter boxes. Once this initial notification has been provided, and subscribers are made aware that they may not be able to receive all the broadcast signals carried by the system, no further notification is warranted.

B. Definition of a Local Commercial Station

The Act contains a multi-pronged definition of a "local commercial station". A "local commercial station" means "any full power television broadcast station [other than a non-commercial station], licensed and operating on a channel regularly assigned to its community that, with respect to a particular cable system, is within the same television market as the cable system."[17/] A "local commercial television station" does not include: (1) low power television stations, television translator stations, or passive repeaters; (2) a television broadcast station that would be considered a distant signal under

---

17/ 47 U.S.C. Section 614(h)(1)(A).

Section 111 of the Copyright Act, if such station does not agree to indemnify the operator for any increased copyright liability resulting from carriage on the system; or (3) a television broadcast station that does not deliver to the principal headend of a cable system either a signal level of -45dBm for UHF stations or -49dBm for VHF stations at the input terminals of the signal processing equipment, if the station does not agree to be responsible for the costs of delivering to the system a signal of good quality or a baseband video signal.[18/]

The Commission should clarify several aspects of this definition. First, the Commission, as proposed in paragraph 17, should adopt a definition that ensures that operators with technically integrated systems are not obligated to carry inconsistent signal lineups. Otherwise, an operator with a single headend serving a fraction of its total subscribers located in a separate ADI could be forced to install expensive equipment to trap out certain broadcast signals from separate portions of its system in order to provide different complements of must carry signals. Operators serving subscribers located in two separate ADI's should have flexibility to determine their over-the-air signal lineup based on the technical feasibility of providing separate signals to different subscriber groups. We believe that this problem could be alleviated by basing a system's carriage obligations in general on the location of its

---

18/ Id. at Section 614(h)(1)(B).

principal headend.[19/] As described infra, in cases where a system serves different ADIs and has historically provided different signals in different portions of its system, it should be able to continue to carry those signals as local signals through use of the market definition waiver process.[20/]

Second, the Commission should clarify that a partially "local" must carry station must pay the copyright costs associated with adding carriage of that particular station to the system's lineup. In other words, if carrying an additional station considered "local" under the must carry rules would force an operator to pay at the 3.75 percent distant signal copyright royalty rate for carriage of an additional distant signal in excess of its quota, then the station must reimburse the operator for carriage at the 3.75 percent rate, rather than at the lower, "permitted" rate. The Commission should also make clear that operators may exercise reasonable credit practices to ensure that payment is made. Thus, as part of an agreement by a station to pay increased copyright fees, an operator could require, for

---

19/ This requirement would coincide with the requirement that an NCE station be located within 50 miles of the system's principal headend.

20/ On the other hand, the fact that two distinct systems may be interconnected, by fiber or otherwise, should not subject them to the same carriage obligations. Those systems should be permitted to choose different over-the-air signal lineups to reflect different subscriber preferences or established viewing patterns.

example, payment in advance of carriage or provision by the station of a letter of credit.

Third, the FCC in paragraph 17 seeks comments on the technical aspects of the exceptions to the "local commercial station" definition. In order to qualify for mandatory carriage, a broadcast signal must be available at the system's signal processing equipment at specified signal strengths. Operators under the recently adopted cable television technical standards requirements are obligated to undertake good engineering practices in order to receive broadcast signals.[21/] We believe that no further obligation should be imposed on operators in the must carry rules regarding receipt of the signal. The Commission also should make clear that an operator under no circumstances is required to engage in extraordinary measures to obtain an over-the-air signal at the prescribed signal strength. Furthermore, in the case of dispute over whether a broadcaster has provided the operator with an adequate signal strength, the burden should be on the broadcaster to demonstrate that its signal meets the requisite standard.

21/ See Cable Television Technical and Operational Requirements, 7 FCC Rcd. 2021, 2024 (1992), recon., FCC 92-508 (rel. Nov. 24, 1992).

C. Definition of a Television Market

Historically, the FCC's must carry rules were based on carriage rights within a defined mileage zone -- generally 35 miles from a television station's reference point, with additional carriage rights for commercial stations considered "significantly viewed" or certain stations within their Grade B contour. The 1992 Act's must carry rules are a significant departure from this historical approach. Instead, the Act grants rights to carriage generally within a station's "Area of Dominant Influence" ("ADI"). The introduction of a new zone of carriage rights may cause many practical problems for many operators.

First, as the NPRM recognizes at paragraph 18, Arbitron may change the composition of an ADI from year to year. Thus, an operator could potentially be faced with shifting carriage rights and obligations in an area in which the Commission historically has recognized the importance of certainty.[22/] As a result of the Act, many operators will be forced to make significant changes in their broadcast signal carriage lineup. The FCC should ensure that additional changes are not required every time a broadcast station or other party can convince Arbitron to change its ADI. Accordingly, at a minimum the FCC should freeze

---

22/ E.g., Cable Television Report and Order, 36 FCC 2d 143, 172 (1972) (explaining that list of major television markets will not be revised each time new rankings are issued: "there must be stability in this area, so that plans and investment can go forward with confidence. A contrary approach would be disruptive to the viewing public.")

these ADIs for the three year period in which stations must maintain their election as to must carry or retransmission consent.

Second, as noted above, a system located in more than one ADI could face different carriage obligations in different parts of the system. Thus, as discussed supra, the Commission should adopt carriage requirements based in general on the location of an operator's principal headend to avoid the problems that could be posed by a system serving subscribers that are located within multiple ADIs. Operators, however, should be permitted to elect to treat their system as being located in an ADI other than where its principal headend is located when the facts warranted.[23/]

Third, to a certain extent the Act accommodates the dual concerns about operators being forced to carry signals that do not serve the local community and that may be located as much as hundreds of miles away from the system, and subscribers losing access to signals they have enjoyed for years. Congress permits the Commission to add or delete communities from an ADI following a written request. The Commission proposes that either party should be entitled to request a change to the ADI, and we agree. Any joint request filed by a station and an operator should be routinely -- and quickly -- granted. In accordance with section 614(h)(1)(c)(iv)'s expedition requirement, the Commission should

---

23/ E.g., where the bulk of the system subscribers do not reside in the ADI in which the principal headend may be located.

conclude any proceedings brought under this provision within 60 days of filing so that operators will have sufficient time to rearrange their program lineups, if necessary, and provide the requisite 30 days' notice to stations that may be deleted or repositioned.

Due to the need for expedition and for operator certainty about their carriage obligations, the Commission should adopt criteria that are clear and workable. Of the factors mentioned in the Act, priority should be given to whether a station historically has been carried by the system, and to whether a signal has been significantly viewed in the cable community. The use of ADIs for determining carriage rights will undoubtedly result in dislocations to cable viewers, especially those located in areas that may identify with a particular metropolitan area yet find itself assigned to a different ADI by Arbitron.[24/] This statutory provision should operate as a safety valve to ensure that subscribers can continue to obtain desired signals.

Fourth, the use of the ADI, as opposed to the 35 mile zone, as a market standard creates the potential for must carry stations to be subject to blackout demands. This possibility occurs because the FCC's syndicated exclusivity and network non-duplication rules for the most part are keyed to a 35 mile zone of protection, rather than an ADI market concept.

24/ For example, Anne Arundel County, Maryland is considered part of the Baltimore ADI, even though parts of the county are closer to Washington than Baltimore.

This leads to several problems. First, a single ADI may include several television stations located more than 35 miles apart. An operator may be required to carry all signals under the new rules, and blackout the more distant station.[25/] Second, systems located near the fringes of an ADI may be within 35 miles of a television station not considered to be part of the ADI in which the system is located, and could be required to blackout programming on must carry signals located within the system's market.[26/] This would be the case, under the syndex and network non-duplication rules, even if the signal requesting blackout is not a must carry signal or is not carried at all by the system.[27/]

Operators should not be in a position of having valuable

25/ This could occur, for example, in the Albuquerque, New Mexico ADI, where a system located within 35 miles of affiliates of each of the three networks in Albuquerque could be forced to carry and then blackout programming on other affiliates located more than 35 miles away in the ADI. Other examples include the Minneapolis, Minnesota, Wichita, Kansas, and Denver, Colorado ADIs.

26/ This situation could arise, for example, in the Pierce City, Missouri; Homerville, Georgia; Jackson, Mississippi; and Truman, Minnesota ADIs, where systems are located with 35 miles of a station in a neighboring ADI, and signals from within the ADI are outside the 35 mile zone of the signals from the adjoining ADI.

27/ See Program Exclusivity in the Cable and Broadcast Industries, 64 R.R. 2d 1818, 1845 (1988) (providing that "a station's right to exercise its syndicated exclusivity rights will not depend on its carriage by the cable system.")

channel capacity occupied by signals filled with "holes."[28/] Nor should signals not even carried on the system be able to assert blackout rights that could deny cable subscribers access to particular programming on signals that the operator is required to carry. We therefore propose that the Commission provide that operators need not blackout syndicated or network programming on any station deemed "local" under the Cable Act definitions.[29/]

D. Selection of Signals

As the NPRM points out,[30/] the Cable Act gives operators discretion in selecting the local commercial must carry stations to be carried in several instances. First, an operator may choose which stations to carry where the number of qualified stations requesting carriage exceeds the "cap". This discretion is subject to two limitations: (1) an operator may not carry a qualified low power station in lieu of a full power commercial station; and (2) in choosing between network affiliates, an

---

28/ This problem is only exacerbated by the application of Section 325 to all commercial broadcast signals, or "any part thereof." Whether operators will be able to freely substitute programming of other broadcast stations for that required to be blacked out is no longer clear.

29/ See Spartan Radiocasting Co. v. FCC, 619 F.2d 314 (4th Cir. 1980) (upholding FCC action exempting significantly viewed signals from network non-duplication blackouts; non-duplication only applied by special relief against significantly viewed signals, with burden on broadcaster to demonstrate need for blackout).

30/ NPRM at para. 24.

operator must carry the affiliate closest to the principal headend of the system.

Second, separate and apart from the rules governing an operator's selection of signals when the number of stations exceeds the cap, operators are afforded the right not to carry local commercial stations that are "substantially duplicating" or not to carry the signals of more than one local commercial television station affiliated with a particular broadcast network. As the Notice recognizes,[31/] this provision is designed to afford operators a measure of discretion while ensuring that the public has access to diverse programming.

The Commission suggests several approaches to defining a "broadcast network" for these purposes, and proposes that the concept of "substantial duplication" be incorporated into this definition.[32/] However, we do not believe that the language of the statute can be read to require one and the same definition for a "broadcast network" and a "substantially duplicating" local commercial station. Merely because a network affiliate may "substantially duplicate" another affiliate does not mean that a station showing "substantially duplicating" programming is part of a broadcast network.

On the one hand, "affiliation" connotes more than just carrying duplicating programming, and implies a regular and

---

31/ NPRM at para. 25.

32/ Id. at para. 26.

distinct business relationship with a particular network entity.[33/] Thus, the Commission for these purposes should define "broadcast network" in the same manner as it has for purposes its financial interest and syndication rules -- an entity that provides 15 hours of prime time programming per week on a regular basis to interconnected affiliates that reach at least 75 percent of the television households nationwide.[34/]

The concept of "substantial duplication", on the other hand, may encompass substantially more stations than just affiliates of a particular broadcast network. Many stations air duplicating programs, but are not "affiliated."[35/] Moreover, the Commission has recognized that a program may be "duplicative" (and subject to blackout under the syndex rules) regardless of whether the identical episode is being shown at the same time.[36/] Thus, we would propose that if a station broadcasts duplicative

---

33/ "Affiliation" under the FCC's rules defines a particular kind of arrangement with one of the national networks wherein the station is "chiefly" involved in the presentation of that network programming.

34/ 47 C.F.R. Section 73.662(i).

35/ This duplication may well be widespread in the case in many large area ADIs, as the FCC through its territorial exclusivity rules has limited the geographic zone in which stations may purchase exclusivity to 35 miles. 47 C.F.R. Section 73.658(m) (limiting purchase of exclusivity to 35 miles or throughout top 100 hyphenated markets listed in Section 76.51.)

36/ See Program Exclusivity in the Cable and Broadcast Industries, 66 R.R. 2d at 57 n.95; United Video v. FCC, 890 F.2d 1163, 1179 (D.C. Cir. 1989).